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PP v. MUHAMMAD ASYRAF AYUT

MAGISTRATES' COURT, PUTRAJAYA
SAIFULLAH QAMAR Mg
[CASE NO: FA-83D-37-04-2019]
12 JUNE 2019

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CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 6 – Possession – Plea of guilty – Sentencing – Mitigating and aggravating factors – Youthful offender – Public interest – Whether public interest best preserved in a rehabilitative sentence as opposed to a deterrent one – Whether punishment of fine and imprisonment suitable for accused – Whether imposing a Community Service Order a more appropriate sentence – Criminal Procedure Code, s. 293(1)(e)(i)*

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CRIMINAL PROCEDURE: *Sentence – Youthful offender – Offence under s. 6 of Dangerous Drugs Act 1952 – Plea of guilty – Mitigating and aggravating factors – Public interest – Whether public interest best preserved in a rehabilitative sentence as opposed to a deterrent one – Whether punishment of fine and imprisonment suitable for accused – Whether imposing a Community Service Order a more appropriate sentence – Criminal Procedure Code, s. 293(1)(e)(i)*

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The accused was charged with having in his possession cannabis weighing 1.34g, an offence under s. 6 of the Dangerous Drugs Act 1952 ('DDA'). The accused was 18 years old when he committed the offence but was charged at the age of 19. The accused pleaded guilty. The court was then left with the issue of sentencing. In mitigation, the accused submitted that he wished to further his studies and asked for the compound to be reduced. The Deputy Public Prosecutor ('DPP'), however, sought a deterrent sentence considering that this was a narcotics offence and submitted that public interest outweighed the accused's own interest. The issues that arose herein were (i) whether the punishment of fine and imprisonment under s. 6 of the DDA was suitable for the accused; and (ii) the feasibility of imposing a community service order ('CSO').

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Held (accused to serve rehabilitative sentence manifesting in a CSO):

(1) What constitutes public interest is coloured by the facts of the case. And in determining the expectation of the public, the sentencing judge or Magistrate is taken to know the particular mores of the society in which the offence was committed. The more outraged the public, the more severe the punishment ought to be in commensuration. This court was of the view that harsh sentences hardly seem to have an effect in reducing narcotics cases. They have little to no deterrent effect. Statistics indicate that in spite of the death penalty, the number of drug- related cases was seeing an exponential increase. (paras 15, 16 & 18)

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(2) The accused had pleaded guilty and was a first offender. The demeanour of the accused showed that he was truly remorseful and apologetic. This was also manifest in his wasting no time to plead guilty at the first instance. The weight of the cannabis in this case was also of a significantly small quantity *ie* 1.34g. In assessing the proportionality of the sentence, the sentencing court must have regard to the gravity of the offence. The quantity of drugs is one aspect constituting the gravity. The lower the weight of the drugs, the less apparent is the seriousness of the offence. The mitigating factors far outweighed the prosecution's effectively sole aggravating factor of public interest. (paras 20 & 21)

(3) As a general rule, when it comes to sentencing 'youthful offenders', the courts recognise that it is in greater public interest that such offenders be rehabilitated. Public interest would be best preserved in a rehabilitative sentence as opposed to a deterrent one. The fact that the accused was a 'youthful offender', s. 293 of the Criminal Procedure Code ought to be given meaning and in the result was the better provision. Therefore, this court was minded to invoke powers under s. 293(1)(e)(i) of the CPC and not s. 6 of the DDA. (paras 23, 27 & 32)

(4) In this case, there was a single charge for possession under s. 6 of the DDA. It was indeed serious and becoming increasingly rampant in the Malaysian society. The answer, however, lay not in harsh punishments such as imprisonment or fine. The purpose, following the line of settled judicial precedent and the law enacted by Parliament in s. 293(1)(e)(i), is better served by way of a CSO which by its nature is punitive. The accused, being a 'youthful offender', the punitive effect is better manifested in ancient sentencing principles through a CSO *ergo* rehabilitation; than it would be through imprisonment *ie* deterrence. (paras 54 & 55)

(5) This court did not impose a fine. Any fine imposed ought to be a hefty one labouring in the thousands. The court would have been oppressive in imposing a burden on the accused which he could not himself meet. Had the court imposed a fine simply to sustain a punishment under s. 6 of the DDA, there could have been two hopeless eventualities (i) the accused might not have been able to pay the fine and hence, would have ended up in prison and this would be an undesirable result; and (ii) the accused might have had the fine paid for him by some other person and may have merrily walked away not having learnt anything from this episode. Like imprisonment, this court did not think a fine suited the factual matrix of the case. A CSO was thus the more appropriate punishment. (paras 59 & 64-66)

(6) In addressing the terms imposed under the SCO, s. 293(1)(e)(i) does not indicate a minimum. It does, however, indicate a maximum of 240 hours. Having considered the offence herein was a relatively serious one, and one pernicious in our society, this court was of the view that 100 hours would be sufficiently punitive. As for the nature of service, 'community service' as defined in s. 293(1)(e)(ii) means any work, service or course of instruction for the betterment of the public at large and including any work performed which involved payment to the prison or local authority. The accused was only required to perform any work, service or course of instruction for the betterment of the public at large. Having determined the nature of the service the accused was to perform, the nitty-gritty details on the execution of the CSO was better determined by JKM. (paras 74-76, 78 & 84)

Obiter:

(1) Our CSO provision in s. 293 is far from perfect. But that did not mean that our courts should shy away from enforcing it in appropriate cases. Any flaws and kinks in the works make for adequate calls for Parliament to improve the provision. In any case, the provisions exist as a flexible sentencing option geared towards rehabilitation. (para 87)

Case(s) referred to:

Oloofsen v. PP [1964] 1 LNS 125 HC ***(refd)***
Positive Vision Labuan Ltd v. Ketua Pengarah Hasil Dalam Negeri & Other Appeals [2017] 9 CLJ 595 FC ***(refd)***
PP v. Adith Sarvotham [2014] 3 SLR 649 ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 HC ***(refd)***
PP v. Justin Heng Zheng Hao [2012] SGDC 219 ***(refd)***
PP v. Kammoon Wannga & Anor [2008] 9 CLJ 479 HC ***(refd)***
PP v. Tia Ah Leng [2000] 5 CLJ 614 HC ***(refd)***
Rex v. Ong Chwee Hoh And Ng Geok Seng [1933] 1 LNS 84 HC ***(refd)***
Rex v. Teo Woo Tin [1932] 1 LNS 71 HC ***(refd)***
Sau Soo Kim v. PP [1975] 1 LNS 158 FC ***(refd)***
Sinnathurai Subramaniam v. PP [2011] 5 CLJ 56 CA ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
Sumardey Hj Jaidin v. PP [2010] 6 MLJ 54 ***(refd)***
Tan Kah Eng v. PP [1965] 1 LNS 179 HC ***(refd)***
Teo Siew Peng & Ors v. PP [1984] 1 LNS 71 HC ***(refd)***
Tukiran Taib v. PP [1955] 1 LNS 166 HC ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:

Child Act 2001, ss. 2, 90(13)
Criminal Procedure Code, ss. 2(1), 293(1)(e)(i), (ii), (iii), 294(6)(a)
Dangerous Drugs Act 1952, ss. 6, 39B
Offenders Compulsory Attendance Act 1954, ss. 3, 5

Other source(s) referred to:
Baljit Singh Sindhu, *Amendments To The Criminal Procedure Code: Radical Or Piecemeal Legislation?,* [2007] 7 MLJ liii, p lxviii

For the prosecution - Noor Jazilah Mohd Yushaa, DPP
For the accused - Unrepresented

Reported by Suhainah Wahiduddin

JUDGMENT

Saifullah Qamar Mg:

Introduction

[1] On 19 April 2019, the accused, one 19-year old male was charged with the following offence (translated into English):

> CHARGE
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> That you on 08/03/2018 on or about 10.00 pm at Kawasan Aras 1, adjacent to Big Apple Donuts, Alamanda Putrajaya, Presint 1, Putrajaya in the Federal Territory of Putrajaya, were found to have in your possession a type of drug called "CANNABIS" weighing 1.34 grams whereby said drug is listed in part III of the first schedule of the Dangerous Drugs Act 1952. Therefore, you have committed an offence under Section 6 of the Dangerous Drugs Act 1952 and may be punished under the same section and Act.
>
> PUNISHMENT
>
> If found guilty, you shall on conviction be liable to a fine not exceeding RM 20,000.00 or to imprisonment for a term not exceeding 5 years or to both under the same section and Act.

[2] It must be highlighted that the accused was 18-years-old when he committed the offence but was charged at the age of 19.

[3] The charge was read to the accused in Malay. He pleaded guilty. I was satisfied that he understood the nature and consequence of his plea. The prosecution then read the facts of the case and tendered all the relevant which were marked and shown to the accused. The accused admitted the facts of the case and all the exhibits tendered.

[4] In those circumstances, I accepted the accused's plea of guilty and convicted him as charged. That only left us with the issue of sentencing. I then proceeded, as is the usual course, to hear mitigating factors from the accused followed by aggravating factors from the prosecution.

[5] I must also state that the accused was unrepresented by counsel.

A **Mitigating Factors**

[6] In mitigation, the accused had this to say (as translated):

> Only my older sister is working. I wish to further my studies at a private institution. I request that I be given the chance to further my studies. I have in total 5 siblings all of which are unemployed. I also ask that the compound be reduced.

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Aggravating Factors

[7] The learned Deputy Public Prosecutor submitted the following aggravating factors (as translated):

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> We seek a deterrent sentence considering that this is a narcotic offence. Public interest outweighs the accused's own interest in this case.

[8] Upon listening to the aggravating factors, I queried the prosecution on the feasibility of imposing a community service order. I was met with the following response (as translated):

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> We leave it to the Court. However, we ask that it be recorded that the Prosecution seeks a section 6 punishment.

[9] I also asked the prosecution whether the accused has had any previous convictions. The prosecution confirmed that he had none.

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The Sentence

[10] In was of the view that neither the punishments of fine nor imprisonment under s. 6 of the Dangerous Drugs Act 1952 ("DDA") were suitable for the accused in this case. I considered the options open to me under the law and saw it fit to impose a community service order ("CSO") under s. 293(1)(e)(i) of the Criminal Procedure Code.

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[11] My oral grounds delivered on 19 April 2019 itself read as follows:

> The accused is not yet the age of 20. This is also his first offence. Taking into account the trite principles of sentencing, deterrence is but only one aspect. It remains to be seen whether heavy sentences have indeed deterred drug offences. Considering the accused is a youthful offender and a first offender, the Court thinks a community service order is more appropriate.

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> The Court accordingly orders, under section 293(e)(i) of the CPC, that the accused perform community service in the form of work, service or course of instruction for an aggregate of 100 hours subject to the time and place and conditions which JKM ("**Jabatan Kebajikan Masyarakat**") may determine. This is on the grounds that the accused is a youthful offender.

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> Find something better to do with your time. The next time around, the Court will not be as 'pemurah' ('lenient').

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Detailed Reasons

Prelude

[12] I now state my reasons for imposing the CSO. Before doing so, I must state that Malaysian case law and academic resources are rather thin on s. 293(1)(e)(i). I did not to the best of my research find any authority on point with the circumstances of this case.

[13] At the outset, when in my oral grounds, I referred to the "trite principles of sentencing", I was referring the four recognised principles in retribution, prevention, deterrence, and rehabilitation.

[14] The prosecution highlighted deterrence as the only reason to impose a s. 6 punishment. Now, when it comes to this overarching concern called "public interest", it has generally been recognised that in cases involving harsh and egregious offences, a deterrence is called for. See generally the judgment of the Court of Appeal per the separate judgment of Abdul Malik Ishak JCA in *Sinnathurai Subramaniam v. Public Prosecutor* [2011] 5 CLJ 56, at [19].

[15] From my extrapolation of the said judgment, what constitutes public interest is coloured by the facts of the case. And, in determining the expectation of the public, the sentencing judge or Magistrate is taken to know the particular mores of the society in which the offence was committed. The more outraged the public, the more severe the punishment ought to be in commensuration. See: *Sinnathurai (supra)* [at [30]-[36]].

[16] On the point of social conditions, I am of the firm view, as I indicated in my oral grounds, harsh sentences hardly seem to have an effect in reducing narcotic cases. They are having little to no deterrent effect.

[17] In the year 2017, Parliament amended s. 39B of the DDA by including a life sentence as an alternative to the death penalty. In so doing, the then Minister, Dato' Sri Azalina Said said as follows (see: Hansard, Dewan Rakyat, per Dato' Sri Azalina Othman, 23 March 2017, at pp. 79-80):

> Tuan Yang di-Pertua, saya ingin menegaskan di sini walaupun itu adalah keputusan Jemaah Menteri, tetapi hukuman mati mandatori tidak boleh dilihat tidak berfungsi sebagai satu hukuman pencegahan. Hal ini kena kita lihat di mana tidak adanya boleh dikatakan satu bukti yang menyatakan bahawa kalau dikatakan hukuman mandatori ini boleh dilihat sebagai langkah pencegahan yang boleh dijamin 100 peratus. *Contohnya, jumlah tangkapan di bawah Akta Dadah Berbahaya 1952 tetap meningkat khususnya daripada 93,100 orang bagi tahun 2010 kepada 140,938 orang bagi tahun 2015. Perkara ini juga telah dibentangkan oleh pensyarah-pensyarah kanan universiti UiTM yang dibentangkan dalam prosiding of International Conference on Social Sciences Research.* (emphasis added)

[18] From one angle, the honourable Minister attempted to justify the death penalty in drug trafficking cases on the grounds that there was no proof that it does not have a deterrent effect. But in the same breath, the honourable Minister cited statistics indicating that in spite of the death penalty, the number of drug related cases is seeing an exponential increase.

[19] To be absolutely clear, I cite the above passage merely as an analogy to illustrate that when it comes to social conditions, harsh sentences *per se* are not playing their role as a deterrent. Thus, why repeat the same perceivably failed experiment indefinitely expecting the same result?

[20] Secondly, public interest aside and taking heed of the above-quoted in judgment in *Sinnathurai*, I am minded that in pursuing a course of deterrence, I must be minded of the facts and circumstances of a given case. In this vein, I think the following mitigating factors (both submitted and obvious in the face of this court), far outweigh the prosecution's effectively sole aggravating factor of public interest.

[21] Said mitigating factors are as follows:

(i) firstly, the accused pleaded guilty. It is trite that a plea of guilty is a mitigating factor. See generally: *Sau Soo Kim v. PP* [1975] 1 LNS 158; [1975] 2 MLJ 134 per Lee Hun Hoe J (as His Lordship then was).

(ii) secondly, the accused is a first offender. It is trite that this is also a mitigating factor. See generally: *PP v. Jafa Daud* [1981] 1 LNS 28; [1981] 1 MLJ 315 per Azmi J (as His Lordship then was).

(iii) thirdly, with the benefit of my audio-visual advantage, I observed from the demeanour of the accused that he was truly remorseful and apologetic. This is also manifest in his wasting no time to plead guilty at the first instance. Exhibiting remorse has also been recognised as a mitigating factor. See: *PP v. Kammoon Wannga & Anor* [2008] 9 CLJ 479; [2009] 8 MLJ 430, per Zamani Rahim J (as His Lordship then was) at [35].

(iv) fourthly, the weight of the cannabis in this case is of a significantly small quantity ie, 1.34g. In assessing the proportionality of the sentence, the sentencing court must have regard to the gravity of the offence. In the case of dangerous drugs, the quantity of the drugs is one aspect constituting the gravity. See generally: *Oloofsen v. Public Prosecutor* [1964] 1 LNS 125; [1964] 1 MLJ 305 and *PP v. Tia Ah Leng* [2000] 5 CLJ 614; [2000] 5 MLJ 401. These authorities suggest that the higher the weight of the drugs, the heavier the sentence ought to be to commensurate for the seriousness of the offence. By parity of reasoning, the lower the

weight of the drugs, the less apparent is the seriousness of the offence. Hence the High Court's holding in one case that the DDA distinguishes the various drug-related offences on their weight. That is why weight plays a crucial role in cases concerning dangerous drugs. See: *Zaidon Shariff v. PP* [1996] 4 CLJ 441; [1996] MLJU 159, at p. 15.

(v) in furtherance to the point made immediately above, I would also note in passing that our courts have even gone on to distinguish, in appropriate cases, the type of drug. For example, cannabis is not as deleterious as drugs like heroin. In the words of Augustine Paul JC (as his Lordship then was) in *Zaidon (supra)*, at p. 16:

> *[T]he penalty* under the (Dangerous Drugs) Act *is also dependent on the nature of the drug involved. For example, an offence for possession of ganja attracts lighter sanctions than one for possession of heroin under the Act.* As the dangerous drug involved in this appeal is *ganja* and its *weight is only 0.04 grams the learned Magistrate ought to have taken these factors into account in assessing sentence*. Evidently, he was swayed by the overstatement that drug offences require a deterrent sentence. (emphasis added)

(vi) fifthly, while all the above constitute standalone points justifying a departure from a deterrent sentence, I think the factor which forms the crux of my judgment is the accused is a youthful offender. There exists a judgment of the Bruneian Court of Appeal acknowledging youth as a mitigating factor. See: *Sumardey Hj Jaidin v. PP* [2010] 6 MLJ 54, per Mortimer PCA at [30]. The accused in that case was 24 years old at the time the offence was committed. All the more, the accused herein was only 18 years of age at the time of commission.

[22] In all fairness to the accused who was unrepresented by counsel, I found it necessary to further carve out the above mitigating factors. At this juncture, I seek to turn to elaborate my judgment on the "youth" point in greater detail.

Rehabilitation Is The Preferred Approach When Dealing With "Youthful Offenders"

[23] As a general rule, when it comes to sentencing "youthful offenders", our courts recognise that it is in greater public interest that such offenders be rehabilitated.

[24] In *Tukiran Taib v. Public Prosecutor* [1955] 1 LNS 166; [1955] MLJ 24, at p. 25, Bellamy J had this to say on a set of facts which resemble those in the present case:

> [A]s I stated earlier, the accused is at most 18 years old -- he is said to look very much younger -- and *he is furthermore a first offender. It has been stressed by this Court that it is very desirable that young offenders, that is, offenders between the ages of 17 and 21 years, who are also first offenders, should be kept out of prison, if possible.*

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> The Magistrate does not appear to have taken this into consideration at all. *I consider that it would be more beneficial to the accused, and in the long run to the community at large, to send him to an advanced approved school rather than to prison,* and I therefore quash the sentence of four months' imprisonment and order that the accused be committed for three years to the Henry Gurney School at Telok Mas. (emphasis added)

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[25] There was of course, at the time no provision for CSOs in the CPC. Perhaps that is why the learned judge sent the accused to Henry Gurney. That and probably the fact that the accused may have been below 18 years of age. But the above case buttresses the point that youthful offenders ought to be kept out of prison. Further, the fact that Bellamy J sent the accused in that case to a reformative institution cements the fact that rehabilitation takes precedence over deterrence.

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[26] On this subject of preferring rehabilitation over deterrence, another decision is on all fours. Tan Chiaw Thong J held in *Teo Siew Peng & 4 Ors v. PP* [1984] 1 LNS 71; [1985] 2 MLJ 125 at p. 129, as follows:

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> In the *Principles of Sentencing* by Thomas (1st Edition), quoting from the judgment in the case of *R v. Smith* [1964] Crim LR 70 that publication at page 19 thereof states:
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> > In the case of a young offender *there can hardly ever be any conflict between the public interest and that of the offender. The public have no greater interest than that he should become a good citizen.* The difficult task of the Court is to determine what treatment gives the best chance of realising that object. That realisation is the first and by far the most important consideration.
>
> Now, in respect of each of the appellants here, there is a favourable probation report. The Probation Service is ready to undertake their supervision if the appellants are placed on probation. *The matter for consideration is whether, in order to give the best chance of realising the object of turning the appellants into good citizens, they should be sent to prison or given another chance to turn over a new leaf, behave themselves and keep out of trouble having regard, as earlier observed, to the fact that all of them were young offenders at the time of the commission of the offence.*
>
> *The Smith case laid emphasis that the public have no greater interest than that young offenders should become good citizens. Having regard to the circumstances of the offence, the character and antecedents of each of the appellants and the probation reports, I am of the opinion that the object of turning the appellants into good citizens could be better achieved by not sending them to prison and imposing whipping at the same time.* (emphasis added)

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[27] I am bound by the authorities aforementioned. Thus, with respect, it seems to have escaped the learned Deputy Public Prosecutor, that the public interest in the present case would have been best preserved in a rehabilitative sentence as opposed to a deterrent one. Faced with the mitigating factors in para. [21] of this judgment, I was therefore minded to invoke my powers under s. 293(1)(e)(i) of the CPC and not s. 6 of the DDA.

Of "Youthful Offenders" – The CSO Under s. 293(1)(e)(i) Of The CPC

The Legislative Intent And General Rationale Behind s. 293(1)(e)(i)

[28] In s. 2(1) of the CPC, Parliament defines "youthful offender" to mean:

> … a person convicted of an offence punishable by fine or imprisonment who is of or above the age of eighteen and below the age of twenty-one …

[29] As mentioned earlier, the accused is 19 years of age. Section 6 of the DDA stipulates the punishment of fine or imprisonment or both. The accused is therefore a "youthful offender" and the nature of the offence being punishable by imprisonment or fine satisfied the conditions of s. 293.

[30] The marginal note of s. 293 of the CPC refers to "youthful offenders". In my view, Parliament expressly enacted the statutory definition in s. 2(1) and its corresponding procedure in s. 293 for a set purpose.

[31] It is a core feature of statutory interpretation that Parliament does not legislate in vain. In other words, each and every word in a statute must be given meaning. See the judgment of the Federal Court in: *Positive Vision Labuan Ltd v. Ketua Pengarah Hasil Dalam Negeri & Other Appeals* [2017] 9 CLJ 595; [2017] 2 MLJ 421, at [44].

[32] After careful consideration, I arrived at the view that a deterrent sentence is unsuitable in the present case, and the fact that the accused is a "youthful offender", s. 293 of the CPC ought to be given meaning and in the result is the better provision. Otherwise, why have the provision? Surely Parliament did not legislate it in vain.

[33] The relevant portions of s. 293 read:

> 293(1) When any youthful offender is convicted before any criminal Court of **any offence** punishable by fine or imprisonment, the Court may, instead of awarding any term of imprisonment in default of payment of the fine or passing a sentence of imprisonment:
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> …
>
> (e) (i) to make an order requiring the offender to perform community service, not exceeding 240 hours in aggregate, of such nature and at such time and place and subject to such conditions as may be specified by the Court;

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(ii) in this paragraph, "community service" means any work, service or course of instruction for the betterment of the public at large and includes, any work performed which involves payment to the prison or local authority; and

(iii) the community service under this paragraph shall be under the
B Minister charged with the responsibility for women, family and community. (emphasis added)

[34] The emphasised portion indicates that s. 293 is applicable to any offence so long as it is punishable with fine or imprisonment. A CSO is therefore granted *in lieu* of those punishments on the discretion of the
C sentencing judge or Magistrate.

[35] To confirm that the above section applies to any offence, and that it was meant for rehabilitative purposes, I referred to its legislative history. It is settled law that reference may legitimately be had to the Hansard to interpret legislation. See the judgment of the Federal Court in *Sivarasa Rasiah*
D *v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333, per Gopal Sri Ram FCJ at [33].

[36] In the Hansard, the then Honourable Minister of Home Affairs elaborated the purpose of amending the then s. 293 (at that time cl. 25 of the relevant Bill which later became Act A1274), as follows:

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Tuan Yang di-Pertua, Fasal 25 ialah fasal yang meminda Seksyen 293. *Jawatankuasa mencadangkan supaya Perintah Khidmat Masyarakat diwujudkan sebagai suatu pilihan bagi pemulihan pesalah muda selain pemenjaraan.*

Pelaksanaan Perintah Khidmat Masyarakat yang dicadangkan *adalah*
F *berdasarkan model dari negara Singapura.* Jawatankuasa telah mendengar maklum balas daripada Menteri Pembangunan Wanita, Keluarga dan Masyarakat. Berdasarkan pandangan mereka, Perintah Khidmat Masyarakat boleh dikenakan ke atas pesalah muda yang berumur di antara 18 hingga 21 tahun.

Sehubungan itu, jawatankuasa mencadangkan supaya Perintah Khidmat
G *Masyarakat diperkenalkan bagi semua jenis kesalahan bagi pesalah muda …*

Jawatankuasa juga memutuskan bahawa pelaksanaan Perintah Khidmat Masyarakat itu *dipertanggungjawabkan kepada Menteri Pembangunan Wanita, Keluarga dan Masyarakat.* (emphasis added)

H See: Hansard, Dewan Rakyat, per Dato' Seri Mohd Radzi bin Sheikh Ahmad, 13 July 2006, at p. 34)

[37] The Bill was passed. At this juncture, two primary points stand out from the Hansard:

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(i) Firstly, Parliament intended that s. 293 be applicable for any offence meeting that description as long as the offender is a youthful one. This is in stark contrast to s. 294 on "first offenders". Subsection 6(a) thereof expressly prohibits the application of the said provision to those charged with serious offences. There is no like prohibition *re* s. 293(1)(e)(i).

(ii) Secondly, Parliament intended that in cases concerning "youthful offenders", the primary target of the sentencing judge ought to be the main focus. This, I think, also speaks to my point on deterrence.

[38] The above portions of the Hansard lend credence to what has already been decided by our courts. When it comes to "youthful offenders", the primary focus and aim of the sentencing judge ought to be rehabilitation. Such is also what the public is taken to expect.

[39] In fact, most recently, Magistrates and all other judges have been encouraged to give effect to the community service provision in s. 293 of the CPC. Tan Sri Richard Malanjum, the former Chief Justice of Malaysia, called upon judges and Magistrates CSOs as opposed to sentences of imprisonment in appropriate cases.

[40] Malanjum CJ said this in his speech on the occasion of the Opening of the Legal Year 2019 the relevant portion of which reads as follows [see: Richard Malanjum, *'Speech – Opening of the Legal Year'* (11 January 2019), at [22]] <http://www.kehakiman.gov.my/sites/default/files OLY%202019% 20CJ%27s%20Speech%20-%20Final_0.pdf>:

> We are encouraging our judges and judicial officers to consider imposing community services instead of imprisonment to offenders in appropriate cases. In this way not only it may better rehabilitate the offenders, it is also costs savings for the Prison.

A Sentence Of Imprisonment Was Inappropriate In Light Of The Principle Of Rehabilitation

[41] With that backdrop, I will now elaborate why I think the requisites to grant a CSO under s. 293(1)(e) have been met. I will first establish, why in my view, the sentence of imprisonment is inappropriate in the present case having regard to the sentencing principle of rehabilitation.

[42] One academician, in her PhD thesis notes one of the important benefits of CSOs. For one, it insulates otherwise innocent youths from being contaminated by hard core actual criminals in prisons. Shortly put, it is geared toward rehabilitation. Secondly, and to me a lesser consideration in the facts of this case, it is cost effective *vis-à-vis* the prison system.

[43] To quote the said academician (see: Asmah Othman, *'The Community Service Order (CSO) In Malaysia: An Exploration of the Perceptions and Experiences of the Youthful Offenders and Supervisors'* (PhD Thesis, 2013) available at <http://usir.salford.ac.uk/id/eprint/30875/1 Asmah_PhD_theses_28.02.2014.pdf>):

> It is indisputable that all the participants seemed to prefer the CSO to custody for many reasons such as the lower operating costs compared to prison or other custodial services, the noble objectives of the sentences besides its primary aim of punishment, *the good it brings to the offenders and the possibility of alleviating the problems in the prisons.* A typical response is best summed up through the words of P01 when he viewed CSO as meeting the objective of its implementation,
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> *... it is cheaper, no stigma, avoidance of exposure to serious crime or hardened criminals in the custody. Benefitting the community with unpaid work and enlightening the offenders with virtues of giving or serving the community, and returns the trainees to the society …* (emphasis added)

[44] The learned academician refers to management staff, social workers and supervisors of CSOs in alpha numeric. The above P01 constitutes a staff of the said class of person. And so, we have it from the proverbial horse's mouth that CSOs represent better alternatives to imprisonment. At the very least, the academic paper represents at least one study proving the sound reasoning of the judgments cited above emphasising rehabilitation over deterrence in cases concerning youthful offenders.

[45] Leaving aside the academic paper, I further supplement my reasoning by reference to decisions of the courts in Singapore. Of interest is the observation in the Hansard regarding Parliament's insertion of s. 293(1)(e)(i) of the CPC that the said provision was drawn from Singapore. Hence, my reference to Singapore.

[46] In *Public Prosecutor v. Adith s/o Sarvotham* [2014] 3 SLR 649, the accused, a 17-year-old male was charged and convicted of drug trafficking under the Singapore Misuse of Drugs Act (Cap 185, 2008 Rev Ed). He was also charged with the offence of using dangerous drugs – cannabis (like in the present case). The accused pleaded guilty to all charges.

[47] The District Court Judge had sentenced him, among others, to 24 hours of community service. The prosecution appealed. On appeal, the High Court held that the sentence was inappropriate on account that the accused had committed a litany of serious offences including trafficking, consumption, cultivation and possession of dangerous drugs. The High Court however declined to intervene as the accused had already served his sentence.

[48] In any case, what I distil from the judgment of the High Court is that even in cases of such kind, rehabilitation should be the primary consideration. Deterrence is only an option, where even if the accused is a youthful offender, the crime was so abhorrent and where the propensity to re-offend is high.

[49] I find guidance for this view in the words of the Chief Justice of Singapore, Sundaresh Menon (sitting as a High Court Judge), who in the said case held as follows (at [13]):

> [R]ehabilitation is generally the dominant sentencing consideration when deciding on an appropriate sentence for a young offender aged 21 years and below (see *PP v. Mok Ping Wuen Maurice* [1998] 3 SLR(R) 439 at [21]). However, this consideration is usually outweighed by the need for punishment or deterrence where serious crimes such as drug trafficking have been committed (see *PP v. Justin Heng Zheng Hao [2012] SGDC 219 at [13] ("Justin Heng"). The District Court in Justin Heng took pains to emphasise that probation had been ordered in PP v. Wong Jia Yi [2003] SGDC 53 only because it was an exceptional case where the risk of re-offending was clearly low. Where the individual offender's capacity for rehabilitation is "demonstrably high", this could outweigh public policy concerns that are traditionally understood as militating against probation (Justin Heng at [15]*). (emphasis added)

[50] The High Court essentially referenced and affirmed a prior judgment of the Singapore District Court in *PP v. Justin Heng Zheng Hao* [2012] SGDC 219. Incidentally, the decision of Justin Heng is that of a subordinate court. But seeing as it has been cited with approval by higher authority, I am inclined to refer to and follow it.

[51] The *Justin Heng (supra)* decision is readily distinguishable from the one before Menon CJ. In *Justin Heng (supra)*, the accused had pleaded guilty to three charges comprising drug trafficking, use and possession. But, the learned Senior District Court Judge, after considering the probation report (the age of the accused was simply stated as below 21 years of age), his Honour decided to sentence him (among others), to 240 hours of community service (the maximum).

[52] Of significance, the Senior District Court Judge, his Honour See Kee Oon (later High Court Judge) opined as follows, with which I am in full agreement (at [26]):

> I was constantly mindful that drug offences, particularly involving trafficking, are among the most pernicious in our society. *However I did not see why a rehabilitative approach for suitable young offenders would trivialise these offences in any way*. As I had noted previously in *Wong Jiayi*'s case, probation is rarely considered and if at all, it should only be in exceptional cases. *While custodial sentences have represented the 'benchmark' or norm, the court's discretion should not be fettered by adopting what V K Rajah J (as he then*

A *was) had described as a 'calcified and rigid' approach towards sentencing, as if such benchmarks are immutable: PP v Dinesh Singh Bhatia* [2005] 3 SLR(R) 1 at [38]. *There must be room in the exercise of sentencing discretion for a more nuanced, or a more 'textured and measured' approach.* (emphasis added)

[53] I bear strictly in mind that the above Singapore judgments concerned
B drug trafficking cases in addition to other charges. But, in spite of such charges, said courts took a 'textured and measured' approach by emphasising the importance of rehabilitation.

[54] In the present case however, comparatively speaking, there is only a single charge for possession under s. 6 of the DDA. Like the Singapore
C Courts, I am not trivialising the offence. It is indeed comparatively serious and is becoming increasingly rampant in our Malaysian society. The answer to me however, lies not in harsh punishments such as imprisonment or a fine.

[55] The purpose, following the line of settled judicial precedent and the law enacted by Parliament in s. 293(1)(e)(i), is better served by way of a CSO
D which by its nature is punitive. As I have stated repeatedly, the accused being a "youthful offender", the punitive effect is better manifested in our ancient sentencing principles through a CSO *ergo* rehabilitation; than it would be through imprisonment ie, deterrence. The point is seeing the punitive effect through via a restorative or rehabilitative approach.

E

Reasons For Not Imposing A Fine

[56] I did not impose a fine for the same reason I did not impose a sentence of imprisonment. The reason again has to do with the general disfavour against deterrence *vis-à-vis* "youthful offenders". In addition, I had other
F reasons for not fining the accused.

[57] A simple glance at the sentencing trend of the cases, and to my understanding, the general practice of the Putrajaya Magistrates' Courts is to impose a hefty fine. This, to me, makes sense otherwise a fine would serve merely as a gentle slap on the wrist. This is all the more so in the context
G of s. 6 of the DDA where the fine goes up to RM20,000.

[58] That being said, the accused submitted in mitigation that his siblings are currently unemployed. I have no information as to whether the accused himself is gainfully employed. But, considering that he is only 19 years old, I think it would be logical to conclude that he is not. I therefore did not
H impose a fine for two reasons.

[59] Firstly, to reiterate, any fine imposed ought to be a hefty one labouring in the thousands. Assuming that I were to impose such a fine, I would think that the court would have been oppressive in imposing a burden on the

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accused which he could not himself meet. As a corollary, a fine is usually accompanied by a default prison sentence. Imposing a hefty fine which the accused could not meet would in effect be sentencing him to prison.

[60] This is not to say that poor people or those not well stationed in life ought to be let off scot-free. It simply means that a fine ought to be proportionate to the means of the offender. I find support for my reasoning in the judgment of Ambrose J in *Tan Kah Eng v. Public Prosecutor* [1965] 1 LNS 179; [1965] 2 MLJ 272 who held as follows (at p. 272):

> The appellant was a seamstress when she was convicted, and a maidservant earning $50 per month when her appeal was heard. The fine of $3,000 seemed to me to be manifestly excessive. It appeared to have been imposed with a view to punishing the promoters of the public lottery in question. *A fine should always be related to the means of the offender. The imposition of a fine beyond the appellant's means or six months' imprisonment in default of payment was tantamount to sentencing the appellant to six months' imprisonment without the option of a fine.* The point to be considered was whether upon the facts of the present case such a sentence was appropriate. *The appellant was a first offender and seventeen years old at the time of her conviction. It is desirable that, as far as possible, a first offender under the age of twenty-one years should be kept out of prison,* unless the offence is so serious that a sentence of imprisonment has to be imposed. (emphasis added)

[61] True, it could be argued that the accused could pay the fine through someone else. But on this point, the High Court of Singapore held that a fine must not be imposed "with an eye on the existence of a gang of wealthy allies". See: *Rex v. Ong Chwee Poh* [1933] 1 LNS 84; [1933] MLJ 39, at p. 40.

[62] Prior to the above judgment, Murison CJ had already held as follows in *Rex v. Teo Woo Tin* [1932] 1 LNS 71; [1933] 1 MLJ 124b, at p. 126:

> [T]he learned magistrate has not, I think, appreciated the points that can properly be considered in determining the quantum of fine to be imposed. These are … *fourthly, the financial position of the offender (Gour Vol. I, p. 345-6).* Previous convictions or unusual prevalence of this particular type of crime might, if proved, be further grounds for enhancing the punishment by fine. *But the fact that an offender has wealthy allies is not such a ground (Ratanlal 556 and Mayne 4th edition, page 28).* The magistrate has not dealt with these details, though he may have had them in mind … and that the appellant is an ordinary small Chinese shop-keeper. (emphasis added)

[63] In my considered opinion, there is sound reasoning as to why the wealth of the accused is relevant while the wealth of those associated with him is not. This is because a fine ought to operate as a lesson to the accused. Not to his family members or to any "wealthy allies".

[64] So, had I imposed a fine simply to sustain a punishment under s. 6 of the DDA, there could have been two hopeless eventualities.

[65] For one, the accused might not have been able to pay the fine and hence, would have ended up in prison. As already explained *in extenso*, this would be an undesirable result. Alternatively, the accused might have had the fine paid for him by some other person and may have merrily walked away not having learned anything from this episode.

[66] Certainly these eventualities could not have been something our criminal justice system envisioned. And accordingly, like imprisonment, I did not think fine suited the factual matrix of this case. This convinced me that a CSO was the more appropriate punishment.

Inadequacy Of A Compulsory Attendance Order

[67] This is something I note for completeness. Prior to s. 293(1)(e)(i) of the CPC, there was and still is in place the Offenders Compulsory Attendance Act 1954 (Act 461).

[68] Section 5 thereof enables the court to commit an offender to a Compulsory Attendance Centre essentially in cases where the court is of the view that a sentence of imprisonment or committal to imprisonment for failure to pay a debt or fine could be better served by through compulsory attendance.

[69] I did not think this punishment is appropriate. Section 3 of the said Act stipulates that there shall be established in and for the States of Peninsular Malaysia, under the direction and control of the Director General, at such places as the Minister may from time to time direct, Compulsory Attendance Centres.

[70] To the best of my research, the said Minister designated Centres in all Peninsular States except in the Federal Territory of Putrajaya. This is manifest in a letter dated 11 August 2010. See: <http://library.kehakiman.gov.my/digital Surat%20Penting%20CR%20Dan%20Pendaftar/2010/Status%20Terkini%20Pelaksanaan%20Community%20Sentencing%20Di%20Bawah%20Offenders%20Compulsory%20Attendance%20Act%201954%20[Act%20461]%20(Akta%20Kehadiran%20Wajib%20Pesalah-esalah%201954).pdf>.

[71] In the absence of a designated Centre, I could not have sentenced the accused to compulsory attendance even if I wanted to. Now, assuming I erred on this point, I remain of the view that nonetheless, a CSO is a better option than a compulsory attendance order.

[72] This is because a CSO as compared to a compulsory attendance order is housed in a specific section. Referring generally to the legislative intent to s. 293(1)(e)(i), Parliament crafted this provision specifically with the rehabilitation of "youthful offenders" in mind.

[73] In this sense, I think the age-old Latin maxim *generalia specialibus non derogant* (the provisions of a general statute must yield to those of a special one) applies rendering s. 293(1)(e)(i) the applicable provision and not the provisions of the Offenders Compulsory Attendance Act 1954.

The Terms of the CSO In The Present Case

[74] The final matter I think I need to address is the terms I imposed under the CSO.

[75] I imposed 100 hours in aggregate. It is to be noted that s. 293(1)(e)(i) does not indicate a minimum. It does however indicate a maximum of 240 hours. In the Singaporean cases aforementioned, said courts imposed the Singaporean maximum of 240 hours in hard-core drug trafficking cases (along with other drug-related charges). There is not for all intents and purposes a benchmark outside those perimeters.

[76] However, having considered that the offence herein is a relatively serious one, and one pernicious in our society, I arrived at the view that 100 hours would be sufficiently punitive.

[77] Section 293(1)(e)(i) also requires the court to determine (i) the nature of the community service; as well as (ii) the time and place and subject to such conditions the court may determine for its performance.

[78] As for the nature of service, "community service" as defined in s. 293(1)(e)(ii) means any work, service or course of instruction for the betterment of the public at large and including any work performed which involves payment to the prison or local authority. In my oral grounds, I only required the accused to perform any work, service or course of instruction for the betterment of the public at large. As explained, I thought it would be better to keep the accused away from prisons. Hence, I considered it fit not to extend his CSO to the second portion of the nature of work.

[79] As for the time and conditions, in my CSO, I allowed the time and conditions to be ascertained by JKM. In other words, it was my considered view that the time and place fixed by the court would be the one fixed by JKM.

[80] I did not consider it appropriate for the court itself to fix a specific time and date. And, this is where I think there is a systemic issue within the CSO mechanism. This very issue has also received comment from at least one expert on criminal procedure. According to Baljit Singh Sindhu, '*Amendments To The Criminal Procedure Code: Radical Or Piecemeal Legislation?*' [2007] 7 MLJ liii, at p. lxviii:

> The section empowers the court to attach such conditions as it may specify when imposing an order for community service. *The powers are very wide in nature and there is a fear that the powers would not be exercised properly by the judicial officers.* There is suggestion that a proper guideline is formatted for the success of the program. *The fact that the Community Service Order is something new in Malaysia, it is suggested that a proper outline is provided to the Magistrate to exercise such power.* (emphasis added)

[81] As it stands, there is no such direction given to Magistrates on how to exercise such powers. Judges and judicial officers cannot proclaim themselves to be experts on this subject.

[82] Thus, I referred to s. 293(e)(iii) of the CPC which stipulates that the community service under this s. 293(e) shall be under the Minister charged with the responsibility for women, family and community. The section itself recognises that JKM (which falls within the purview of that Ministry), is better placed to determine performance of the community service.

[83] The above also resonates with Parliament's intention. At para. [41] of this judgment, I highlighted how during the reading of the Bill, the then Minister of Home Affairs noted that "pelaksanaan Perintah Khidmat Masyarakat itu dipertanggungjawabkan kepada Menteri Pembangunan Wanita, Keluarga dan Masyarakat".

[84] In short, having determined the nature of the service the accused is to perform, the nitty-gritty details on the execution of the CSO, in my opinion is better determined by JKM. This is all the more considering that nowhere in s. 293 of the CPC does it require me to first call upon JKM to be present at court nor does it require me to first seek a probation report. This is unlike the provisions of s. 90(13) of the Child Act 2001 requiring a Court for Children to first obtain a probation report prior to sentencing. This court did not sit as a Court for Children. The accused is not below the age of 18, and hence, is not a "child" as defined in s. 2 of the Child Act 2001.

Conclusion

[85] In sum, it is my firm view, after analysing all the authorities on point that it would be better in the interest of the public that the accused serve a rehabilitative sentence manifesting in a CSO.

[86] In any case, the CSO I issued contains a provision that in the event JKM finds that the accused fails to comply with the terms of the CSO, it remains open to JKM to apply to this court to have the accused perform the remaining aggregate hours. Alternatively, the CSO is worded broadly enough that should the accused breach the CSO, he may still be punished under s. 6 of the DDA.

[87] I would tend to agree that our CSO provision in s. 293 is far from perfect. But, that does not mean that our courts should shy away from enforcing it in appropriate cases. Any flaws and kinks in the works make for adequate calls for Parliament to improve the provision. In any case, the provision exists as a flexible sentencing option geared towards rehabilitation.

[88] I concluded my oral grounds by admonishing the accused. I told him that he had better find something better to do with his time and that the court would not be as lenient the next time around. In saying that, I had in mind the wise words of Sundaresh Menon CJ who in *Adith (supra)* said "I urged (the accused) to make the best of this opportunity and to turn over a new leaf."